

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

ROGER KINKENNON,

Plaintiff,

vs.

Case No. 1:09-cv-644 WDS/DJS

**OHIO CASUALTY INSURANCE
COMPANY,**

Defendant.

**ORDER GRANTING DEFENDANT'S FIRST MOTION
FOR SUMMARY JUDGMENT**

This matter is before the Court on Defendant's First Motion for Summary Judgment, filed June 4, 2010. (Document 26). Plaintiff has not filed opposition to the motion and the time in which to do so has expired. Accordingly, the Court deems the motion unopposed and accepts as true moving defendant's statement of undisputed material facts.

On July 4, 2007 Plaintiff was operating a vehicle owned by MH Services, Inc. and was involved in an accident. The vehicle operated by Plaintiff struck a vehicle operated by Jose Lozoya-Ramirez head on. Both Mr. Lozoya-Ramirez and Plaintiff were seriously injured in the accident. Plaintiff was subsequently charged with careless driving. Defendant has submitted the report of an accident reconstructionist who is of the opinion that the vehicle driven by Plaintiff drifted over the center of a two lane highway, thereby causing a head on collision with the vehicle driven by Lozoya-Ramirez. Mr. Lozoya-Ramirez sued Plaintiff, and Plaintiff did not bring a counterclaim against Lozoya-Ramirez. That lawsuit has been resolved.

MH Services, Inc. had a business auto policy issued by Defendant Ohio Casualty. The

policy was in effect on July 4, 2007 and provided liability insurance and uninsured motorist insurance with limits of \$1,000,000.00. The policy also provided “Utah Personal Injury Protection” with limits, in pertinent part, of \$3,000.00 for medical expenses for a covered “auto” licensed or principally garaged in Utah.

Plaintiff filed his complaint in this matter in the Eleventh Judicial District of the State of New Mexico. The complaint asserted that Plaintiff was “covered for personal injury, personal injury uninsured motorist, and medical payments” under the policy in question. Plaintiff has claims for breach of the insurance contract, violation of the Insurance Act of the State of New Mexico, and bad faith. Defendant filed a notice of removal on July 1, 2009 and the case proceeded in federal court.

Ohio Casualty moved for summary judgment on two grounds. The first is that Plaintiff is not entitled to Personal Injury Protection because the vehicle he was driving at the time of the accident was registered and principally garaged in New Mexico, not Utah. The second is that Plaintiff cannot recover under the UM/UIM provisions of the policy because he failed to bring a compulsory counterclaim against Lozoya-Ramirez and therefore is not legally entitled to recover damages from him, and because there is no evidence that Lozoya-Ramirez was uninsured or underinsured.

As noted earlier, Plaintiff has not filed opposition to Ohio Casualty’s Motion for Summary Judgment, and it is therefore deemed unopposed. The Court has considered the arguments advanced by Ohio Casualty in its brief and finds them well taken. Accordingly, the Court will grant the motion, and find as a matter of law that Plaintiff, Roger Kinkennon, is not entitled to recovery of any uninsured/underinsured motorist coverage or personal injury protection benefits under the policy of insurance that Ohio Casualty issued to MH Services, Inc.

IT IS THEREFORE ORDERED that Defendant's First Motion for Summary Judgment, filed June 4, 2010. (Document 26) is therefore granted and those claims are dismissed.

A handwritten signature in black ink, appearing to read 'W.D. Schneider', is written above a horizontal line.

W. DANIEL SCHNEIDER
UNITED STATES MAGISTRATE JUDGE